Bank Kerjasama Rakyat Malaysia Bhd v Nesaretnam a/l Samyveloo

HIGH COURT (IPOH) — ORIGINATING SUMMONS NO 24–809 OF 2001
BALIA YUSOF JC
31 OCTOBER 2002

Land Law *— Charge — Order for sale — Form 16D of National Land Code 1965 specified 14 days to remedy the breach — Whether Form 16D contrary to s 254 of National Land Code 1965*

The plaintiff granted a banking facility to the defendant and as security, the defendant charged a piece of land ('the said land') in favour of the plaintiff. The defendant defaulted under the banking facility and consequently, the plaintiff issued a notice of default in Form 16D of the National Land Code 1965 ('NLC') to the defendant pursuant to s 254(1) thereof. In the Form 16D, the defendant was given 14 days to remedy the breach, failing which, the plaintiff would proceed to apply for an order for sale in court. The defendant did not remedy the breach and the plaintiff then proceeded to apply for an order for sale of the said land in encl 1. At the hearing of encl 1, the defendant's counsel contended that the Form 16D was defective as it did not provide for a period of at least one month within which to remedy the breach as provided under s 254 of the NLC. The counsel relied on the High Court decision of *Mohamad Khalid Rahaman & Anor v Citibank Bhd & Anor* [2000] 5 MLJ 421.

Held, dismissing the plaintiff's application:

This court was very much persuaded by the High Court decision of *Mohamad Khalid Rahaman & Anor v Citibank Bhd & Anor* in dismissing the plaintiff's application. However, neither of the counsel drew to the court's attention that the said High Court decision had been overruled by the Court of Appeal in *Citibank Bhd v Mohamed Khalid bin Farzalur Rahaman & Anor Citibank Bhd v Mohamed Khalid bin Farzalur Rahaman & Anor* [2000] 4 MLJ 96. Accordingly, based on the principle of stare decisis, this court was clearly in error in dismissing the plaintiff's application. As in the High Court cases of *Mohamad Khalid Rahaman & Anor v Citibank Bhd & Anor* and *OCBC Bank (M) Bhd v Gunasegaran a/l Arunasalam* [2000] 6 MLJ 859, the instant decision to dismiss the plaintiff's application was based on the more restrictive interpretation of s 254 of the NLC, which had been ruled by the Court of Appeal to be erroneous. In the circumstances, the dismissal of the plaintiff's application cannot be upheld (see p 107C–G).

[Bahasa Malaysia summary

Plaintiff memberi satu kemudahan perbankan kepada defendan dan sebagai cagaran, defendan menggadai sebidang tanah ('tanah

tersebut') in memihak kepada plaintif. Defendan ingkar di bawah kemudahan perbankan dan berikutnya, plaintif mengeluarkan satu notis ingkar dalam Borang 16D Kanun Tanah Negara 1965 ('KTN') kepada defendan menurut s 254(1) dalamnya. Dalam Borang 16D, defendan diberi masa selama 14 hari untuk membaiki kemungkiran, dan sekiranya gagal, plaintif akan terus memohon perintah jual di mahkamah. Defendan tidak membaiki kemungkiran ini dan plaintif kemudiannya terus memohon perintah jual ke atas tanah tersebut dalam lamp 1. Di pembicaraan lamp 1, peguam defendan berhujah bahawa Borang 16D kurang sempurna kerana ia tidak memperuntuk tempoh sekurang-kurangnya sebulan dalam mana untuk membaiki kemugkiran seperti yang diperuntuk di bawah s 254 KTN. Peguam bergantung pada keputusan Mahkamah Tinggi dalam kes *Mohamad Khalid Rahaman & Anor v Citibank Bhd & Anor* [2000] 5 MLJ 421.

Diputuskan, menolak permohonan plaintif:

Mahkamah ini amat yakin dengan keputusan *Mohamad Khalid Rahaman & Anor v Citibank Bhd & Anor* dalam menolak permohonan plaintif. Walau bagaimanapun, tiada seorang dari peguam menarik perhatian mahkamah bahawa keputusan Mahkamah Tinggi tersebut telah diakas oleh Mahkamah Rayuan dalam *Citibank Bhd v Mohamed Khalid bin Farzalur Rahaman & Anor Citibank Bhd v Mohamed Khalid bin Farzalur Rahaman & Anor* [2000] 4 MLJ 96. Dengan itu, berdasarkan prinsip stare decisis, mahkamah ini jelas terkhilaf dalam menolak permohonan plaintif. Seperti dalam kes-kes Mahkamah Tinggi, *Mohamad Khalid Rahaman & Anor v Citibank Bhd & Anor* dan *OCBC Bank (M) Bhd v Gunasegaran a/l Arunasalam* [2000] 6 MLJ 859, keputusan untuk menolak permohonan plaintif adalah berdasarkan tafsiran yang lebih ketat ke atas s 254 KTN, yang telah diputuskan oleh Mahkamah Rayuan sebagai terkhilaf. Dalam keadaan demikian, penolakan permohonan plaintif tidak boleh disahkan (lihat ms 107C–G).]

Notes

For cases on order for sale, see 8 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1939–2020.

Cases referred to

Citibank Bhd v Mohamed Khalid bin Farzalur Rahaman & Anor [2000] 4 MLJ 96 (folld)

Low Lee Lian v Ban Hin Lee Bank Bhd [1997] 1 MLJ 77 (folld)

Mohamad Khalid bin Farzalur Rahaman & Anor v Citibank Bhd & Anor [2000] 5 MLJ 421 (refd)

OCBC Bank (M) Bhd v Gunasegaran a/l Arunasalam [2000] 6 MLJ 859 (refd)

Legislation referred to

National Land Code 1965 ss 254, 256, Form 16D

Kiranjit Kaur (*Mustafa Ling & Co*) for the plaintiff.
Jayaprathap (*Jayaprathap & Partners*) for the defendant.

Balia Yusof JC: The plaintiff in this case is a bank while the defendant is the owner of a piece of land known as HS (D) DGS 475/84, Lot No 026538, in the district of Manjung, Sitiawan ('the said land'). On 8 May 2000, the plaintiff approved a loan facility under the concept of Al-Bai Bithamin Ajil in favour of the defendant for a sum of RM55,000 vide exh HM-3 in encl 2 ('the said facility'). In consideration of the said facility granted, the defendant charged the said land to the plaintiff bank vide presentation no 18682/2000, Vol 2A, Folio 15, which is being exhibited in encl 2 as HM-1 ('the said charge').

When the defendant defaulted payment, the plaintiff caused to issue a notice of default in Form 16D dated 15 March 2001 (exh HM-4 of encl 2) ('Form 16D') to the defendant pursuant to s 254(1) of the National Land Code ('the NLC'). It was stated in the Form 16D that the defendant was required to remedy the breach within 14 days failing which the plaintiff would proceed to apply for an order for sale in court. Upon the defendant's failure, the plaintiff filed this foreclosure action.

At the hearing of the action in encl 1, the defendant's counsel raised an objection contending that the content in Form 16D is defective in that the period of seven days as stipulated in the said Form 16D is in contravention of the statutory period as provided for in s 254 of the NLC. It was contended on behalf of the defendant that s 254 of the NLC provides for a period of at least one month in respect of the breach by the chargor of the said property and that the Form 16D stated the duration of the breach as seven days and at the same time gave only a period of 14 days for the defendant to remedy the breach. Section 254 of the NLC stipulates that:

> (1) Where, in the case of any charge, any such breach of agreement as is mentioned in sub-section (1) of section 253 has been continued for a period of at least one month or such alternative period as may be specified in the charge, the chargee may serve on the chargor a notice in Form 16D —
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> (a) specifying the breach in question;
> (b) requiring it to be remedied within one month of the date on which the notice is served, or such alternative period as may be specified in the charge; and
> (c) warning the chargor that, if the notice is not complied with, he will take proceedings to obtain an order for sale.
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> (2) Where, after the service of any such notice, the charged land or lease becomes vested in any other person or body, the notice shall be as valid and effectual against that person or body as it was against the person or body on whom it was served.
>
> (3) If at the expiry of the period specified in any such notice the breach in question has not been remedied:

(a) the whole sum secured by the charge shall (if it has not already done so) become due and payable to the chargee; and
(b) the chargee may apply for an order for sale in accordance with the following provisions of this Chapter:

Provided that paragraph (a) shall not apply to any charge to secure the payment of an annuity or other periodic sum.

In dealing with a foreclosure action under s 256 of the NLC, the Federal Court in *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77 laid down the principle that (at p 88):

> A judge hearing an application under s 256 of the Code must bear in mind that the procedure under the section is meant to be speedy and summary in nature. He is first concerned with whether the chargee has given the appropriate statutory notices as stipulated in the Code. Next, he must ensure that the procedural requirements prescribed by O 83 of the Rules of the High Court 1980 have been complied with. Next, he is concerned with the very narrow question whether the material produced before him by the chargor constitutes cause to the contrary.

The Federal Court went on to explain the meaning of 'cause to the contrary' in s 256(3) of the NLC by saying that 'cause to the contrary' under s 256(3) of the NLC might be established only in three categories of cases: (i) when a chargor was able to bring his case within any of the exceptions to the indefeasibility doctrine in s 340 of the NLC; (ii) when a chargor could demonstrate that the chargee had failed to meet the conditions precedent for the making of an application for an order for sale; and (iii) when a chargor could demonstrate the grant of an order for sale would be contrary to some rule of law or equity. If no cause to the contrary could be shown, the court would be obliged to make an order for sale.

In objecting to the said application, learned counsel for the defendant relied on the case of *Mohamad Khalid bin Farzalur Rahaman & Anor v Citibank Bhd & Anor* [2000] 5 MLJ 421 wherein it was held that (at the headnote):

> In looking into the reason why Parliament had specifically stated that the period of default ought to be at least one month, it is logical to conclude that the longer the time that is given to the chargor, the better is his opportunity to protect his property from foreclosure. It did not make sense therefore to hold that. whilst parties were free to contract to include a period other than one month as stated in s 254(1), it ought to mean that the chargee could stipulate a period of time shorter than one month. Applying the golden rule of interpretation of statutes, the period of breach referred to in s 254(1) of the NLC should be at least one month (see p 426E–G). This is because when s 254(1) of the NLC stipulated that the period of breach ought to have been continued for a period of at least one month, the alternative period that may be specified in the charge by the chargee bank must be a period greater than one month, otherwise Parliament would have specifically stated it (see p 426C–D).

Kamalanathan Ratnam J held that the parties had no right to shorten the period from 30 days to anything less than what is provided for in s 254 and the order for sale obtained by the bank was declared to be null and void.

The same principle was followed in the case of *OCBC Bank (M) Bhd v Gunasegaran a/l Arunasalam* [2000] 6 MLJ 859. The defendant's counsel submitted they have shown cause to the contrary under s 256(3) of the NLC and as such plaintiff's action ought to be dismissed.

In reply, counsel for the plaintiff submitted that s 254(1)(b) of the NLC does allow an alternative period to be specified in the charge and cl 14 of the said charge clearly provides for a period of seven days. The parties have contracted on this and are therefore bound by it. No authorities were submitted to support her contention.

Having considered the arguments of both counsels and the authorities cited and further guided by the principles enunciated in *Low Lee Lian v Ban Hin Lee Bank Bhd*, I accordingly dismissed the plaintiff's action with cost. In dismissing the plaintiff's action, I was very much persuaded by the authority cited by the learned counsel for the defendant in the case of *Mohamad Khalid bin Farzalur Rahaman & Anor v Citibank Bhd & Anor* (supra) which was followed in the case of *OCBC Bank (M) Bhd v Gunasegaran a/l Arunasalam*. Little did I realize and neither counsel for both sides drew to my attention to the fact, that the case of *Mohamad Khalid bin Farzalur Rahaman & Anor v Citibank Bhd & Anor* was overruled by the Court of Appeal in *Citibank Bhd v Mohamad Khalid B Farzalur Rahaman & Ors* [2000] 4 MLJ 96. The Court of Appeal held that the judge's interpretation of s 254(1) of the NLC was wrong and at p 105, Gopal Sri Ram JCA said:

> So when Parliament enacted s 254(1) of the Code and employed therein the words 'or such alternative period as may be specified in the charge', it clearly intended by that phrase to alter the law by enabling a chargee to impose a period of less than a month. The Code in s 254 therefore expressly permits a chargor by contract to accept a statutory notice of less than one month.

Such being the case, and based on the principle of stare decisis, I was clearly in error in holding that Form 16D is irregular and dismissing the plaintiff's application. It is much regretted that this court was not aware of the decision of the Court of Appeal much earlier and counsel for both parties too, in my belief, were not aware of the same. As in the case of *Mohamad Khalid bin Farzalur Rahaman & Anor v Citibank Bhd & Anor* and *OCBC Bank (M) Bhd v Gunasegaran a/l Arunasalam*, my decision relies on the more restrictive interpretation of s 254 of the NLC which has been ruled by the Court of Appeal to be erroneous. In the circumstances, the dismissal of the plaintiff's action cannot be upheld.

Plaintiff's application dismissed.

Reported by Lim Lee Na